

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARK PHILLIPS; REBECCA PHILLIPS,

Plaintiff,

v.

FIRST HORIZON HOME LOAN
 CORPORATION; MORTGAGE
 ELECTRONIC REGISTRATION SYSTEM,
 INC.; JAMES WOODALL; THE MORTGAGE
 LAW FIRM, PLC; MAX DEFAULT
 SERVICES CORPORATION; FEDERAL
 NATIONAL MORTGAGE ASSOCIATION;
 CARMEN RIVERA,

Defendants.

3:12-cv-00013-RCJ-WGC

ORDER

Before the Court is a wrongful foreclosure action alleging deceptive foreclosure practice by parties not authorized to foreclose on Plaintiffs' property. Plaintiffs now motion the Court for partial summary judgment (ECF No. 39), and Defendants counter motion for summary judgment (ECF No. 41). For the reasons stated herein, the Court denies Plaintiffs' and Defendants' Motions for Summary Judgment.

I. FACTS AND PROCEDURAL HISTORY

On April 11, 2007, Plaintiffs Mark and Rebecca Phillips executed a note in the amount of \$266,840 secured by a deed of trust (the "Deed of Trust") to the property located at 2185 Evergreen Park Drive, Reno, Nevada 89521 (the "Property"). (Deed of Trust, ECF No. 40-4, at 1-2). The Deed of Trust listed First Horizon Home Loan Corporation as lender, Capital Title Company of Nevada as trustee, and MERS as nominee. (*Id.* at 1-2).

Plaintiffs were unable to make the payments due on the loan secured by the Deed of

1 Trust on or about March 2010. (Amended Compl., ECF No. 28, at 5). Max Default Services
2 Corporation ("Max Default") then recorded a notice of default on July 1, 2010, claiming to
3 be the trustee of the Deed of Trust. (Notice of Default, ECF No. 40-5, at 2-4). On July 8,
4 2010, Federal National Mortgage Association ("Fannie Mae") substituted Max Default as
5 trustee. (Appt. Successor Trustee, ECF No. 40-5, at 5-6). On July 30, 2010, MERS
6 assigned all beneficial interest in the Deed of Trust to Fannie Mae. (Assignment, ECF No.
7 40-6, at 1-2). However, this assignment was not recorded with the Washoe County
8 Recorder until June 10, 2011. (*Id.*).

9 On November 1, 2010, a certificate from the State of Nevada Foreclosure Mediation
10 Program was issued. (Certificate, ECF No. 40-7, at 1). This certificate was recorded a year
11 later on November 14, 2011. (*Id.*). James Woodall executed a notice of trustee's sale on
12 November 1, 2011, which was recorded on November 14, 2011. (Notice of Sale, ECF No.
13 40-7, at 2-3). On November 7, 2011, Fannie Mae executed a substitution of trustee,
14 formally substituting James Woodall, The Mortgage Law Firm, and Max Default as trustees
15 of the Deed of Trust. (Sub. Trustee, ECF No. 40-6, at 3-4). On November 28, 2011, the
16 Property was sold to Fannie Mae in satisfaction of the unpaid debt on the loan, which
17 amounted to \$289,472.56. (Deed Upon Sale, ECF No. 40-8).

18 Plaintiffs filed a pro se complaint in Nevada state court on November 28, 2011
19 against First Horizon Home Loan Corporation, MERS, James Woodall, The Mortgage Law
20 Firm, Max Default, Fannie Mae, and Carmen Rivera. (Compl., ECF No. 1-1, at 1). The
21 complaint asserted two causes of action, the first for quiet title and the second for
22 intentional interference with a prospective economic advantage. (*Id.* at 8-10). The dispute
23 was then removed to this Court on January 9, 2012 under diversity jurisdiction. (Pet. for
24 Removal, ECF No. 1, at 2).

25 Defendants Fannie Mae and MERS filed a motion to dismiss the complaint for failure
26 to state a claim along with a motion to expunge the lis pendens on the Property on January
27 19, 2012. (Mot. to Dismiss, ECF No. 5; Mot. to Expunge ECF No. 6). Plaintiffs then filed
28 three motions on January 27, 2012: (1) a motion to amend the complaint; (2) a motion for

1 partial summary judgment; and (3) a motion to remand the action to state court. (Mot. to
2 Amend, ECF No. 11; Mot. for Partial Summ. J., ECF No. 12; Mot. to Remand, ECF No. 13).
3 The amended complaint alleges four causes of action, including: (1) quiet title; (2) wrongful
4 foreclosure; (3) negligence; and (4) deceit. (Am. Compl., ECF No. 28, at 10-13). The
5 amended complaint further removes First Horizon Home Loan Corporation and Carmen
6 Rivera as defendants. (*Id.*).

7 The Court denied Defendants' motions to dismiss and to expunge lis pendens on the
8 basis they were moot as Plaintiffs had amended the Complaint. (Order, ECF No. 27). The
9 Court also denied Plaintiffs' motions for partial summary judgment and to remand, but
10 granted their motion to amend the Complaint. (*Id.*).

11 Before the Court now are Plaintiffs' Motion for Partial Summary Judgment, and
12 Defendants Motion for Summary Judgment.

13 II. LEGAL STANDARDS

14 A motion for summary judgment is a procedure that terminates, without a trial,
15 actions in which "there is no genuine issue as to any material fact and that the moving party
16 is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(a). The
17 party seeking summary judgment always bears the initial burden of persuasion to the court.
18 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party must identify those
19 parts of the pleadings, depositions, answers to interrogatories, and admissions on file,
20 together with affidavits, if any, which it believes demonstrate the absence of a genuine
21 issue of material fact. *Id.* "The court need consider only cited material, but it may consider
22 other materials in the record." Fed. R. Civ. P. 56(c)(3). The principal purpose of summary
23 judgment is "to isolate and dispose of factually unsupported claims." *Id.* at 324. Material
24 facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby,*
25 *Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is
26 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.*
27 In determining summary judgment, a court uses a burden-shifting scheme:

28 When the party moving for summary judgment would bear the burden of proof

1 at trial, it must come forward with evidence which would entitle it to a directed
2 verdict if the evidence went uncontroverted at trial. In such a case, the moving
3 party has the initial burden of establishing the absence of a genuine issue of fact
4 on each issue material to its case.

5 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
6 (citation and internal quotation marks omitted). In contrast, when the nonmoving party
7 bears the burden of proving the claim or defense at trial, the moving party can meet its
8 burden in two ways: (1) by presenting evidence to negate an essential element of the
9 nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a
10 showing sufficient to establish an element essential to that party's case on which that party
11 will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If the moving
12 party fails to meet its initial burden, summary judgment must be denied and the court need
13 not consider the nonmoving party's evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S.
14 144, 159–60 (1970).

15 If the moving party meets its initial burden, the burden then shifts to the opposing
16 party to establish a genuine issue of material fact. See *Matsushita Elec. Indus. Co. v.*
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual
18 dispute, the opposing party need not establish a material issue of fact conclusively in its
19 favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to
20 resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
21 *Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party
22 cannot avoid summary judgment by relying solely on conclusory allegations that are
23 unsupported by factual data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
24 Instead, the opposition must go beyond the assertions and allegations of the pleadings and
25 set forth specific facts by producing competent evidence that shows a genuine issue for
26 trial. See Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. At the summary judgment
27 stage, a court’s function is not to weigh the evidence and determine the truth, but to
28 determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249. The
evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
in his favor.” *Id.* at 255.

1 III. DISCUSSION

2 In their amended Complaint, the Phillips allege four claims: 1) a wrongful foreclosure
3 claim against Fannie Mae; 2) A quiet title claim against Fannie Mae; 3) a negligence claim
4 against Woodall, the Law Firm, and Max Default; and 4) a Fraud claim against Max Default
5 and MERS.

6 Plaintiffs move for partial summary judgment on their claims of Wrongful Foreclosure
7 and Eviction and Quiet Title of Declaration of Rights, “but only where those causes of
8 action rely on the deficiency of status of Max Default Services Corporation as trustee.”
9 (Mot. Partial Summary J., ECF No. 39, at 2). Plaintiffs posit to the Court “whether a non-
10 judicial foreclosure can validly be effectuated by a party who is not trustee, but who is
11 legally a stranger to the note and deed of trust.” (*Id.*). The applicable statutes on
12 foreclosure in 2010 provide that “The power of sale must not be exercised, however, until:
13 [t]he beneficiary, the successor in interest of the beneficiary or the trustee first executes
14 and causes to be recorded . . . a notice of a breach and the election to sell . . .” N.R.S. §
15 107.080 (2)(c). Thus, the beneficiary, the trustee, or a successor in interest may
16 commence a non-judicial foreclosure proceeding provided other notice requirements are
17 met. The statutes specifically state “to secure the performance of an obligation or the
18 payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised
19 after a breach of the obligation . . .” N.R.S. § 107.080 (1). Therefore, it is typically the
20 trustee who executes the NOD and NOS in a non-judicial foreclosure.

21 Plaintiffs correctly assert that a party must first ascend to the position of trustee
22 before it can exercise the rights of a trustee. Because the NOD was filed by Max Default
23 on July 1, 2010, which was arguably prior to the notarized substitution of trustee dated July
24 8, 2010, Plaintiffs argue Max Default had no authority to execute the NOD. Defendants
25 assert the trustee, Max Default, was the properly appointed trustee at the time of the
26 foreclosure proceedings because the substitution was dated June 28, 2010. However, the
27 Court finds conflicting dates in the notarizing and recording of the substitution of trustee in
28 relation to this purported substitution date of June 28, 2010. Defendants assert that the
notarization, which occurred more than a week later, is simply a memorial of the actual

1 appointment on June 28, 2010. The Court does not agree, and finds that the signature of
2 the beneficiary authorizing the substitution is the legally recognized execution of the
3 substitution that the notary is swearing to have witnessed under penalty of perjury. The
4 signature within the document purporting the authority to appoint a substituted trustee is the
5 effective instrument which provides the rights and powers to that newly appointed entity.
6 Regarding the appointment or substitution of a trustee, the signatures in the document
7 represent the legal authority to its time and contents, and the notary is the legal recognition
8 of the signatures therein. This issue is of no small consequence due to all the recent
9 foreclosures which have and are occurring in an automated fashion in Nevada. The
10 substitutions of trustees and assignments of beneficiaries of deeds often occur several
11 times in the course of a foreclosure. Due to the often conflicting dates of these
12 substitutions, and whether the trustee was in authority to proceed with a non-judicial
13 foreclosure, Nevada legislators recently added a statutes addressing the problem. Nevada
14 Revised Statute § 107.028 details qualifications, limitations on powers, and the required
15 notice of substituted trustees and became effective July 1, 2011. Although not relevant to
16 this first NOD in this action, its language is applicable to the latter substitution which will be
17 analyzed in this Order. Among other requirements, it specifically states that the
18 appointment or substitution of a trustee is not effective until it is recorded in the county in
19 which the real property is located. N.R.S. 107.028(4).

20 Nevada law requires that the beneficiary or trustee first executes and records a
21 Notice of Default and of the Election to Sell prior to a trustee exercising its power of sale.
22 As mentioned above, Defendant, Max Default, filed the NOD on July 1, 2010. (NOD, ECF
23 No. 40-5, at 2-3). The first Appointment of Successor Trustee was executed on July 8,
24 2010. (Appt. Succ. Trustee, ECF No. 40-5, at 4). Thus, Max Default was not legally
25 authorized to execute the NOD, as it was not as yet the trustee. Further, the Court finds
26 even more conflicts regarding the assignment of the deed of trust and who was the actual
27 beneficiary at this time. In both the NOD and the Appointment of Successor Trustee, Max
28 Default is named as the trustee who is acting for the benefit of Fannie Mae. The NOD was
executed by Max Default on July 1, 2010. The Appointment of Successor of Trustee was

1 executed on July 8, 2010 by Fannie Mae. However, contrary to Defendants claims, but
2 according to documentation in exhibits, Fannie Mae was not assigned the deed of trust until
3 July 30, 2010. (Corporate Assign. Deed Trust, ECF No. 40-6, at 1-2). Thus, Max Defaults
4 substitution as trustee was not executed by the beneficiary of the deed.

5 At some point, it appears Fannie Mae began the foreclosure process anew. As
6 mentioned above, the foreclosure statutes have been amended and even some additional
7 requirements are required in a non-judicial foreclosure. On November 7, 2011, Fannie Mae
8 executed another Substitution of Trustee naming Max Default and James Woodall, The
9 Mortgage Law Firm, LLC, as trustee. (Sub. Trustee, ECF No. 40-6, at 3-4). The addition of
10 James Woodall is likely due to NRS 107.028 which mandates "The trustee under a deed of
11 trust must be: An attorney licensed to practice law in this state;" NRS 107.028(1)(a).
12 On November 14, 2011, Max Default recorded the certificate of the state mediation
13 foreclosure program purporting to indicate that no request for mediation was made by
14 Plaintiffs. (Certificate, ECF No. 40-7, at 1). However, this certificate was more than a year
15 old and dated November 1, 2010. The same day, November 14, 2011, Max Default
16 recorded the Substitution of Trustee and a Notice of Trustees Sale. (Notice of Sale, ECF
17 No. 40-7, at 2-3). The NOS stated that the Property would be sold at public auction on
18 November 28, 2011. The property was sold to Fannie Mae on November 28, 2011.

19 Defendants failed to execute a valid NOD prior to the NOS. The statutes are very
20 clear about required notice prior to foreclosure. "The power of sale shall not be exercised
21 until: the beneficiary, the successor in interest of the beneficiary, or the trustee first
22 executes and causes to be recorded . . . a notice of the breach and of the election to sell . .
23 . ." N.R.S. § 107.080; see *also* N.R.S. § 107.086 (additional requirements for owner-
24 occupied housing). In other words, the steps in a non-judicial foreclosure sale commence
25 with the execution of a NOD. See *Id.* Then, depending on whether mediation is requested,
26 the NOS may be executed, followed by the actual auction and sale of the property. The
27 Court finds Defendants did not follow statutory procedures in their attempt to foreclose on
28 Plaintiffs mortgage. Defendants assert there was no wrongful foreclosure. Citing to an
order from this Chamber, Defendants claim, "[a]s long as the note is in default and the

1 foreclosing trustee is either the original trustee or has been substituted by the holder of the
2 note or the holder's nominee, there is simply no defect in foreclosure." *Gomez v.*
3 *Countrywide Bank*, FSB, No. 09-1489, 2009 WL 3617650, at *2 (D. Nev. October 26,
4 2009). This is true, but Plaintiffs' contention is with the unauthorized trustee, not whether
5 the note was in default.

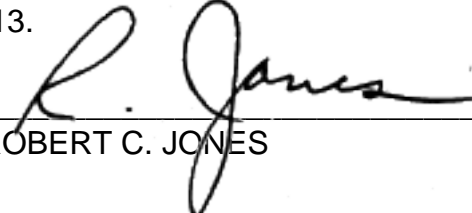
6 The facts support the allegation that Plaintiffs have defaulted on their mortgage note.
7 And, Plaintiffs have not contented otherwise. Plaintiffs have continually remained in
8 possession of the Property since the commencement of these foreclosure proceedings
9 and, apparently, have not made any payments towards the debt on the Property since
10 March of 2010. Clearly there is a note that is in default and a beneficiary that is entitled to
11 the security of the mortgage, or payment of the note. Defendants have failed to provide
12 any evidence to prove they were authorized to proceed with the foreclosure in July of 2010.
13 Yet, the fact remains that Plaintiffs have not disputed the allegations of their default for non
14 payment. A foreclosure is not wrongful if the note was in default. See *Gomez*, FSB, No.
15 09-1489, 2009 WL 3617650, at *2. The Court finds that at some time during the process
16 Defendants had the authority to foreclose, they just didn't follow the rules. What remains to
17 be determined is if there are any damages, statutory or otherwise, that Plaintiffs are entitled
18 to for Defendants wrongful actions. If so, are any of those damages offset by Plaintiffs
19 continued possession and use of the Property during the past three years?

20 For the reasons stated above, at this time the Court denies Plaintiffs Motion for
21 Partial Summary Judgment and denies Defendants Countermotion for Summary Judgment.

22 CONCLUSION

23 For the foregoing reasons, IT IS ORDERED Plaintiffs' Motion for Partial Summary
24 Judgement (ECF No. 39) is DENIED. It is further ORDERED Defendants Countermotion for
25 Summary Judgment (ECF No. 41) is DENIED.

26 Dated: This 25th day of March, 2013.

27 
28 ROBERT C. JONES